SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

DAVID H. RATNER, *Appellant*,

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal From the United States District Court for the Southern District of Illinois, Southern Division

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JURISDICTIONAL STATEMENT

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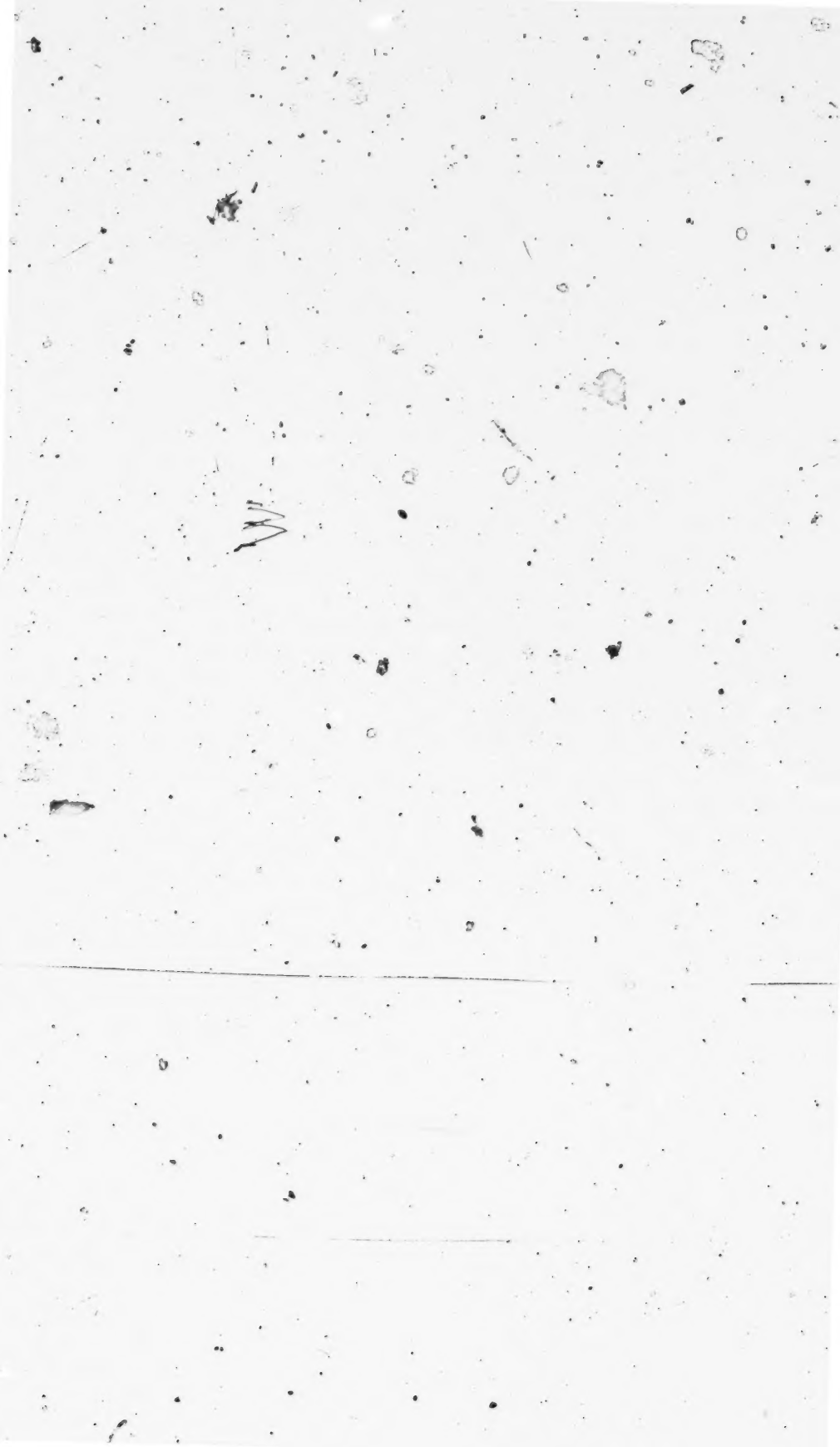

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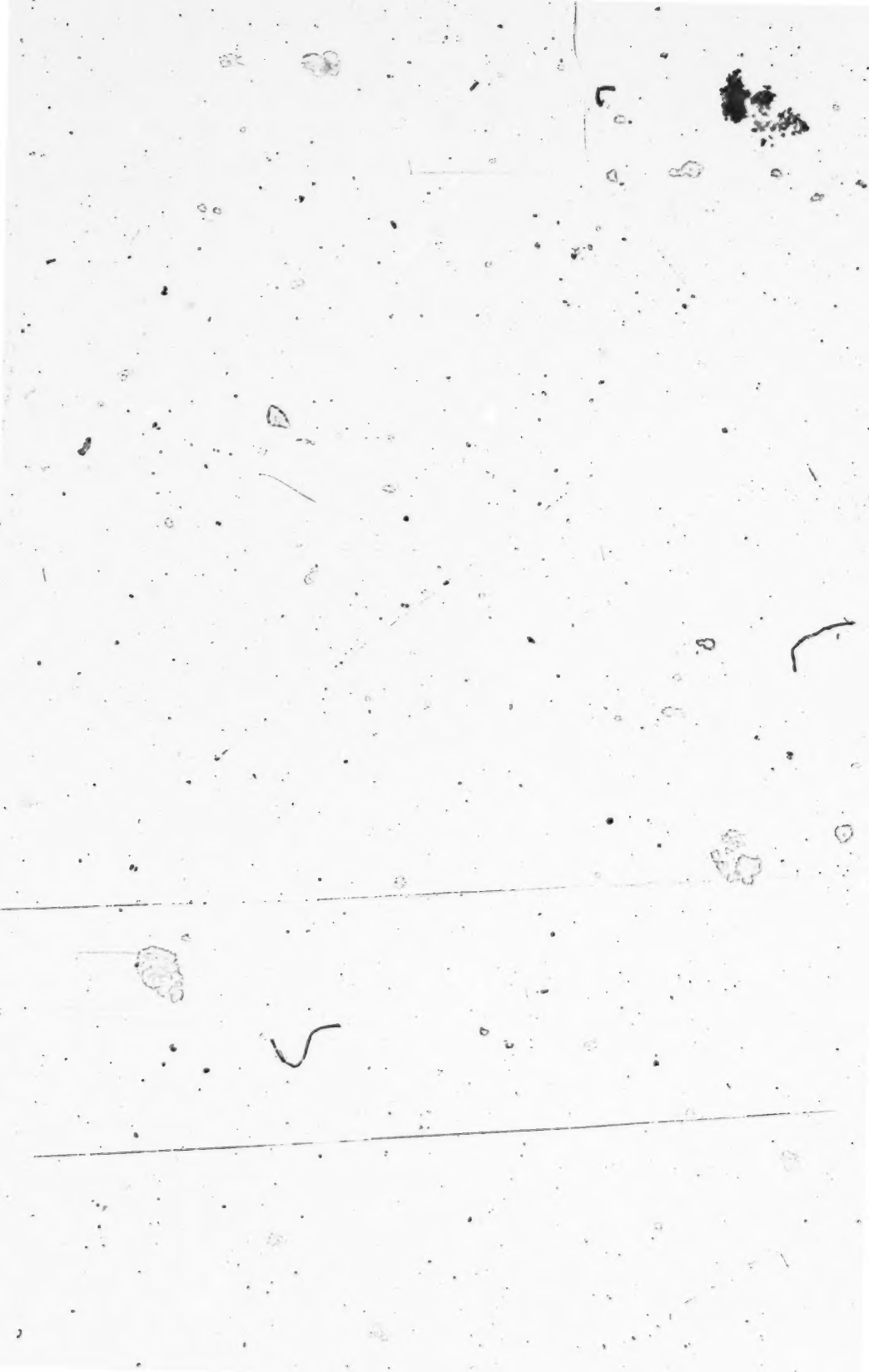

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On Appeal From the United States District Court for the Southern District of Illinois, Southern Division

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the Southern District of Illinois, Southern Division, entered on December 23, 1957, sustaining an order of the Interstate Commerce Commission, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Illinois, Southern Division, is not yet reported. The opinion of the Interstate Commerce Commission, by Division 4, is reported in 70 M.C.C. 251. Copies of the Court's opinion and order, of the opinion of the Interstate Commerce Commission, by Division 4, and of the order of the Interstate Commerce Commission dated June 3, 1957, denying appellant's petition for reconsideration, are attached hereto as Appendix A.

JURISDICTION

This suit was brought under Title 28 U.S.C. Section 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on December 23, 1957, and notice of appeal was filed in that court on January 28, 1958. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C., Sections 1253 and 2101(b). *United States* v. *Capital Transit Company,* 325 U.S. 357; *United States* v. *Detroit and Cleveland Navigation Company,* 326 U.S. 236; *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515.

QUESTION PRESENTED

The question presented is whether, in a proceeding under Section 5(2) of the Interstate Commerce Act, which provides in substance that the Commission shall authorize consolidations, mergers, or acquisitions of control by and between carriers if it finds that the proposed transaction "will be consistent with the public interest", the Interstate Commerce Commission may lawfully require proof of a *public need* for the proposed transaction as a prerequisite to approval thereof.

STATUTES INVOLVED

The statute directly involved is Section 5(2) (a), (b), and (c) of the Interstate Commerce Act, Title 49 U.S.C., Section 5(2) (a), (b), and (c). Also cited herein for purposes of comparison is Section 207(a) of the Interstate Commerce Act, Title 49 U.S.C., Section 307(a). These sections of the Interstate Commerce Act are reproduced in Appendix B hereto.

STATEMENT

Appellant is an individual owning a controlling interest in Hayes Freight Lines, Inc., and Service Transfer and Storage, Inc., both of which are common carriers by motor vehicle, subject to Part II of the Interstate Commerce Act. In February, 1955, he filed with the Interstate Commerce Commission an application for authority to acquire control of Tompkins Motor Lines, Inc., which also is a common carrier by motor vehicle, subject to Part II of the Interstate Commerce Act. The necessity for approval by the Interstate Commerce Commision of this proposed acquisition of control is set forth in Paragraph (2) (a)(i) of Section 5 of the Interstate Commerce Act which provides, so far as here pertinent, that the provisions of Section 5 shall apply to "a person which is not a carrier and which has control of one or more carriers [who seeks] to acquire control of another carrier through ownership of its stock or otherwise".

The routes served by Hayes Freight Lines, Inc., Service Transfer and Storage, Inc., and Tompkins Motor Lines, Inc., do not overlap, but are complementary to each other. Tomkins operates throughout the South, Nashville, Tenn., being its most Westerly terminal. Hayes operates throughout the States of Illi-

nois, Indiana, Iowa, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, Tennessee and West Virginia, connecting with Tompkins at Nashville, Tenn. Service operates between Minneapolis-St. Paul and Chicago, connecting with Hayes at the latter point. As will be seen, these routes lie end-to-end and do not duplicate or parallel each other.

At the time this proposed transaction had its inception, in 1955, the outstanding capital stock of Tompkins Motor Lines, Inc., was owned by Mr. W. H. Tompkins, the founder of the company. At that time, Mr. Tompkins was 78 years of age and in poor health. Because of his age and his health, he was unable to devote more than a small fraction of his time to the management and operation of his company. Most of the time, the company was operated by employees, who, although admittedly competent in their respective fields, had had no previous experience in the field of top management. During the three-year period, 1952-1954, which immediately preceded appellant's offer to purchase the company, Tompkins Motor Lines operated at a loss, and, as a result of its deteriorating financial position, it was unable to borrow money which it needed for operating capital and to finance the purchase of new equipment.

It is to be emphasized that this was a substantial motor carrier property. During the year 1954, Tompkins operated a fleet of 25 trucks, transported 53 million pounds of freight (of which approximately 14 million pounds was interchanged with other carriers, including Hayes Freight Lines), and earned a gross revenue of $859,196. But it had become obvious that without financial aid from some outside source, the

company was seriously threatened with disintegration; possibly with insolvency.

In February, 1955, appellant entered into a contract with Tompkins to purchase from him 14 shares, representing all of Tompkins Motor Lines' stock, for $206,830. In addition to agreeing to purchase these shares of stock, appellant also contracted immediately to take over the management of Tompkins Motor Lines on a temporary basis, pending disposition by the Commission of his application to acquire control. In May, 1955, the Interstate Commerce Commission found that an immediate and urgent need existed to preserve the Tompkins property, and authorized appellant to take over the management of Tompkins on a temporary basis. He has managed the property continuously since that date. Should this appeal be denied, such temporary management necessarily will be terminated.

The application was made the subject of a formal hearing before the Interstate Commerce Commission at which numerous motor carriers operating within the area served by Tompkins intervened in opposition.

Briefly, the applicant, Ratner, sought to show that approval of the proposed transaction would be beneficial to Tompkins Motor Lines *and to the public* by reason of the fact that appellant has the managerial experience and the financial resources to restore the company to a sound position and to operate it successfully, thus assuring it continued operations. Eight witnesses representing shippers who utilize Tompkins' service testified in support of the application, expressing their interest in, and desire to have the service preserved. The Interstate Commerce Commission agreed that these benefits would flow from the

transaction, finding at Page 257 of its report (70 M.C.C. 251, Page 10a, Appendix A herein):

> There appears to be little doubt that applicant has had considerable experience in the overall management of motor carriers, and it is reasonable to assume that were he to acquire control of Motor Lines, his experience would be of value to that carrier. It is also apparent that his control of Motor Lines in common with Hayes and Service would benefit it through participation in volume purchasing of supplies, equipment, and other essentials and would improve the efficiency and economy of its service by coordinated operations with such carriers. . . . His personal balance sheet discloses a net worth of about $743,000 which, in our opinion, is sufficient to indicate an ability to meet his obligations arising from the transaction.

On the other hand, it was contended by those motor carriers who opposed the application that if Tompkins Motor Lines should be permitted to come under common control with Hayes Freight Lines, Inc., under appellant's management, a radical change in the character of its service would occur, and that, to all intents and purposes, the result would be the same as if a new carrier had been authorized to operate within the territory. They expressed the fear that business which they are now handling would be diverted to Tompkins — although such fears were necessarily speculative.

If the Interstate Commerce Commission, in denying the application had found, without more, that approval of this transaction would result in impairment of existing carriers' service to the public, a different question would be presented, i.e., whether

such a finding was supported by substantial evidence. However, instead of simply making findings to this effect, the Commission interwove throughout the findings which it did make, observations to the effect that applicants had failed to prove that there was any "need" for approval of the proposed transaction, or that the service of existing carriers was "inadequate". In other words, the Commission's whole approach was colored by the legal misconception that applicants were under an obligation to prove public convenience and necessity for the proposed transaction. It is true that the Commission did not use the phrase "public convenience and necessity", but this concept permeates its report, culminating in its ultimate finding—an outright misstatement of the law—that:

> The burden of showing that the proposed coordinated operations *would meet a public need* and would be consistent with the public interest is upon applicant. In the instant proceeding, that showing has not been made. (pp. 12a and 13a, Appendix A herein) (Emphasis added).

Ratner filed a timely petition for reconsideration of the report and order of Division 4 of the Commission in which the above-quoted language appears, pointing out that burden of proof imposed by Section 5 of the Interstate Commerce Act *makes no reference to "public need"*. This petition was denied by the Commission's order of June 3, 1957, which affirmed the report and order of Division 4 without further opinion.

Thereafter, appellant brought this action in the United States District Court for the Southern District of Illinois, Southern Division, under Title 28 U.S.C., Sections 1336 and 2321, to review the decision of the Commission. The District Court sustained the

Commission's decision, one judge dissenting. The Court quoted the language which is quoted above, i.e., "The burden of showing that the proposed coordinated operation would meet a public need and would be consistent with the public interest is upon applicant." The Court found that: "The use of these words in the order are unfortunate and do not correctly state the law", but it then dismissed the whole subject with the rhetorical question: ". . . should this case be decided upon a mere play of words?" The Court went on to conclude that the proposed acquisition of control would create a new service in an area already adequately served by motor carriers, and that such a new service could draw additional traffic only from existing carriers to the detriment of such carriers. It concluded that such a result may not properly be found to be consistent with the public interest. Ultimately, it concluded that the Commission had not exceeded the statutory limits within which Congress confined its discretion, and that its findings were adequate and supported by evidence.

The District Court majority apparently assumed that the Commission would have reached the same result in this particular case, even if it had not entertained the erroneous conception that the applicant had an obligation to establish a public need for the proposed transaction. Apart from the general unsoundness of such an approach to administrative determinations, examination of both the majority and dissenting opinions of the Commission will establish how unjustified the assumption was in the context of this particular case. The majority opinion itself recognized that there was a public need for Motor

Lines' (Tompkins) continued operations and that the proposed transaction would strengthen and improve those operations. It found, however, that the transaction was not absolutely necessary to keep Motor Lines in operation and that it would result in some diversion of traffic from other existing carriers. It made no effort to assess the seriousness of such diversion or its relative significance from the point of view of the public interest as compared with the improvement and strengthening of Motor Lines' operations. Instead, it simply concluded that because the proposed transaction was not shown to be absolutely essential to Motor Lines' survival, and because some injury to competitors was possible, that applicant had failed to satisfy its supposed "burden of showing that the proposed coordinated operations would meet a *public need* and would be consistent with the public interest". (Emphasis added). The dissenting opinion, on the other hand, pointed out that "the record is not persuasive that protestants would be particularly harmed, or require protection from, any different policy of operation that might be inaugurated by a new management". In this state of the record and findings, it is apparent that the Commission's erroneous conception with respect to the controlling statutory standard may well have been the decisive factor in tipping the scales one way rather than the other. It is even conceivable that the majority of the Commission took refuge in the supposed statutory standard, with its stultifying burden of proof as an escape from the exacting task of assessing the public benefits to be derived from the proposed transaction as compared with the possible adverse effects upon competitors. At any rate, it is clearly the appropriate function of the Court to insist that the Commission

perform that task candidly and explicitly, in the light of a correct understanding of the applicable statutory standard, rather than to sustain the Commission on the assumption that it would have reached the same result even if it had not misconceived its statutory responsibilities.

Appellant's position is succinctly and forcefully summarized in the dissenting opinion of Judge Briggle:

> I think it obvious that the Commission proceeded on an erroneous basis and imposed on plaintiff a burden not warranted by the Act. I cannot close my eyes to the fact that this of necessity affects the integrity of their findings and order. I therefore, respectfully dissent.

THE QUESTION PRESENTED IS SUBSTANTIAL

With increasing frequency, the Interstate Commerce Commission has invoked the legal doctrine that a proposed merger, consolidation, or unification of motor carriers subject to the Act which is likely to result in any material change in the character of the service theretofore conducted by the individual carriers involved in the transaction, may be approved only if it is shown that there is a "public need" for the proposed acquisition. This interpretation of the law, which has been invoked with varying degrees of explication in prior decisions, has reached its culmination in the present case in which the Commission found *as a matter of law* that in a proceeding under Section 5 of the Act, the burden of proof was upon the applicants to show that the proposed coordinated operations *would meet a public need.* No such burden of proof is imposed, either expressly or implicitly, by Section 5(2) of the Interstate Commerce Act.

The fundamental conflict between this position of the Commission and the previously prevailing interpretation of Section 5(2) is illustrated by two cases in which opposing motor carriers sought judicial review of orders of the Interstate Commerce Commission authorizing the purchase by one motor carrier of another, on the grounds that the Commission had failed to find that there was a public need for the consolidation or merger of the carriers involved, and had failed to find that the service of existing carriers was inadequate. In both cases, these contentions were overruled; in one, the opinion of the lower court was affirmed by this Court.

In *M. & M. Transportation Co.* v. *United States*, 128 F. Supp. 296, affirmed 350 U.S. 857, the Commission's order approving the acquisition by one motor carrier of another was attacked (by M. & M., a competing carrier), on the ground that no findings were made, (1) that a public need existed for the unification of the two carriers, (2) that the existing service was inadequate, and (3) that a new service was not created by the acquisition. The Court, however, sustained the Commission's order, holding that such findings are not required as a condition to approval of a transaction under Section 5(2), saying in part (128 F. Supp. at Page 301):

> . . . it is not possible here to hold that the statute's 'consistent with the public interest' required the basic findings urged by petitioners.

Moreover, in the footnote to the quoted language (fn. 4), the Court explained:

> The distinction between Section 5's 'consistent with the public interest' and Section 207's 'public

> convenience and necessity' disposes of the contention as to a finding of public need. And even within Section 5, it is evident that Congress intended a distinction between 'public interest' and 'public advantage.' Petitioners' argument that the Commission must find the existing service inadequate in a Section 5 proceeding has been rejected by the Supreme Court. *McLean Trucking Company* v. *United States*, 1944, 321 U.S. 67, 86-87 64 S. Ct. 370, 88 L. Ed. 544. Lastly, it would not seem that the creation of a new service would be inconsistent with the public interest—on the contrary, it might greatly benefit the public. If the petitioners' argument were to prevail, acquisitions would be limited to those involving non-contiguous carriers, or carriers which substantially interchanged all through traffic with one another.

In *Anderson Motor Service* v. *United States*, 151 F. Supp. 577, Anderson, a competing motor carrier, challenged an order of the Interstate Commerce Commission approving the purchase and consolidation of two competing motor carriers, alleging that the Commission's order was unlawful and void because the Commission had departed from a line of precedents to the effect that when the Commission finds that a new service would result from the acquisition by one carrier of the operating rights of another, the Commission must further find a "public need" for such service. In answer thereto, the Court stated that:

> (8) . . . . The law is clear, however, that the *Interstate Commerce Commission is not required to make findings of public need, inadequacy of existing service, or that a new service was not created by an acquisition proceeding involving only motor carriers.* (Emphasis added).

(9) The standard to be applied is 'consistent with the public interest.' That phrase was construed by the U. S. Court of Appeals for the Ninth Circuit in *Pacific Power & Light Co.* v. *Federal Power Commission,* 111 F. 2d 1014. The court, loc. cit. 1016, said:

> 'We think the Commission ascribes a meaning to the statute not borne out by its language. The section provides that "after notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same." The phrase "consistent with the public interest" does not connote a public benefit to be derived or suggest the idea of a promotion of the public interest. The thought conveyed is merely one of compatibility. Congress resorted to this language rather than to the use of the stock term "public convenience or necessity," or to such phrases as "in furtherance of" or "will promote the public interest" used in its interstate commerce legislation (later considered); and the language employed ought to be construed to mean no more than it says. It is enough if the applicants show that the proposed merger is compatible with the public interest. *The Commission, as a condition of its approval, may not impose a more burdensome requirement in the way of proof than that prescribed by law.*' (Emphasis added).

The Court noted in the *Pacific Power & Light* case that the statutory standard of the Federal Power Act, 16 U.S.C.A., § 791a et seq., which it was there interpreting, differed from the standard prescribed by Congress for the Interstate Com-

merce Commission under Section 5 of the Interstate Commerce Act. At that time, the Interstate Commerce Act required a showing that the proposed acquisition would 'promote the public interest', a provision since changed to precisely the language utilized in the Federal Power Act and interpreted by the court in the *Pacific Power & Light* case.

In *McLean Trucking Company* v. *Unitd States*, 321 U.S. 67, which is quoted at some length in the opinion of the court below from which this appeal is taken, it was contended by the appellant that the Commission could not lawfully authorize the merger of several motor carriers into one system unless it found that the service of existing carriers was inadequate, and that the proposed consolidation was necessary to bring about adequate service to the public. The gravamen of the complaint in this case was that the proposed consolidation of several motor carriers into a single system violated the anti-trust laws. This Court rejected that contention, as well as the contention that the proposed transaction could be approved only if the Commission found that the service of existing carriers was inadequate and recognized that the National Transportation Policy "would be furthered by 'encouraging the organization of stronger units' in the motor carrier industry." 321 U.S. 86.

Thus, other district courts have held that "public need" need not be proven in a transaction arising under Section 5 of the Interstate Commerce Act, and this Court has affirmed this principle. Other district courts, and this Court as well, have held that inadequacy of existing service need not be proven as a

condition precedent to aproval of an application under Section 5 of the Act. The decision of the Interstate Commerce Commission, review of which is sought by this appeal, conflicts squarely with those decisions.

This conflict cannot be dismissed as "a mere play of words" as the District Court sought to do. It represents a fundamental and deep-rooted misconception of the law which has recently dominated the Commission's interpretation of Section 5 of the Act, and which has permeated the decision from which this appeal is taken. References to "public need" and to "adequacy of existing service" appear throughout the Commission's report and it is clear that its decision turned upon the question whether "public convenience and necessity" required approval of the transaction before it. If the Congress had intended to require proof of "public need" (or public convenience and necessity) as a prerequisite to approval of purchases, consolidations, or mergers of motor carriers, it had at its command the language to say so, clearly and explicitly. Such language is used in other Sections of the Act and it is significant that it is *not* used in Section 5.

For these reasons, it is respectfully submitted that an administrative interpretation of the law which is contrary to the plain language of the statute, contrary to prior decisions of the Courts, and contrary to the policy of the Congress, presents a question of sufficient

substance and public importance to warrant consideration by this Court.

Respectfully submitted,

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APPENDIX A

INTERSTATE COMMERCE COMMISSION

No. MC-F-5927

DAVID H. RATNER—CONTROL—TOMPKINS MOTOR LINES, INC.

Decided December 12, 1956

Application of David H. Ratner for authority to acquire control of Tompkins Motor Lines, Inc., through purchase of capital stock, denied.

Milton E. Diehl and *James Clarence Evans* for applicants.

Sidney Alterman, Maurice F. Bishop, Joseph H. Blackshear, Bates Block, Robert W. Brunow, George H. Cote, Louis I. Dailey, C. Y. Dupont, John J. Emerick, A. W. Flynn, Jr., Walter Harwood, Charles Hudson, Jr., J. C. Hutcheson, P. H. Johansen, Kenneth J. McAuliffe, Guy A. Postell, H. J. Reynolds, Jr., Dan R. Schwartz, and *James W. Wrape,* for protestants.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MITCHELL, CLARKE, AND HUTCHINSON

BY DIVISION 4:

Exceptions were filed by applicant to the report of the examiner, which recommended denial of the application, and certain protestants replied. Concurrently with their reply, Wilson Truck Company, Inc., Johnson Freight Lines, Inc., and Mohawk Motor Lines, Inc., filed a motion to strike applicant's exceptions as not complying with the

provisions of rule 96 of the General Rules of Practice, and to find that the report and order of the examiner has become the order of the Commission. In our opinion, the exceptions sufficiently meet the requirements of rule 96. The motion to strike will be overruled.

By an application filed February 24, 1955, David H. Ratner, of Springfield, Ill., seeks authority under section 5 of the Interstate Commerce Act to acquire control of Tompkins Motor Lines, Inc., hereinafter called Motor Lines, of Nashville, Tenn., through purchase of 14 shares of its outstanding capital stock for $206,830. A hearing has been held, at which 26 motor common carriers[1] and rail carriers in eastern territory opposed the application and a majority offered evidence. Briefs were filed by applicants, rail carriers, and certain motor-carrier protestants. By order entered June 15, 1955, Great Southern Trucking Company, a motor carrier, was permitted to intervene in opposition to the application. The findings of fact in the examiner's report are adopted as our own and will not be restated herein.

Applicant controls through stock ownership, Hayes Freight Lines, Inc., and Service Transfer & Storage, Inc.,

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[1] B & M Express, Inc., Bowman Transportation, Inc., C. E. McBride, doing business as Colonial Fast Freight Lines, Central Motor Lines, Inc., Floyd & Beasley Transfer Company, Inc., Georgia Highway Express, Inc., Gordons Transports, Inc., Hennis Freight Lines, Inc., Hoover Motor Express Company, Inc., Huber & Huber Motor Express, Inc., Jack Cole Company, Inc., Johnson Freight Lines, Inc., Killion Motor Express, Inc., Malone Freight Lines, Inc., Mohawk Motor Lines, Inc., doing business as Wehby System—Mohawk Motor Lines, The Silver Fleet Motor Express, Inc., Watkins Motor Lines, Inc., Wilson Truck Company, Inc., and Youngblood Truck Lines, Inc., Alterman Transport Lines, Inc., Belford Trucking Co., Inc., Frigidways, Inc., Refrigerated Transport Co., Inc., Southeastern Truck Lines, Inc., St. Louis-Nashville Freight Lines, Inc., and Tennessee Carolina Transportation, Inc. The seven last-named carriers subsequently withdrew their opposition to the application.

hereinafter called Hayes and Service, respectively, and owns one-third of the outstanding capital stock of Southwest Freight Lines, Inc. He also controls through stock ownership, K & R Leasing Co., which leases equipment to Hayes, and controls through management Hayes Realty Company, the stock of which is held by a bank as trustee for his children under an irrevocable trust arrangement and which owns the terminals used by Hayes. The latter operates more than 20 motor vehicles.

Pursuant to authority granted May 16, 1955, as supplemented October 25, 1955, under section 210a (b), applicant assumed control of Motor Lines through management until final determinaton of the secton 5 application, at a compensation of not exceeding $50 a month. Temporary management began May 27, 1955.

The examiner recommended denial of the application, finding principally that Hayes and Motor Lines interlined very little traffic with each other prior to the instant agreement; that approval of the transaction would enable applicant to establish over the lines of Motor Lines and the carriers he presently controls, a new competitive service not previous existing and for which public convenience and necessity has not been shown; that the new service would radically change the present competitive balance now existing by substituting a strong aggressive carrier for one whose competition has not been a decisive factor and would so seriously harm certain motor-carrier protestants engaged exclusively in the transportation of refrigerated commodities as to jeopardize their ability to continue their respective services; that protestants are transporting all available traffic and are equipped to handle more; that the proposed transaction would revitalize operations from about 43 mill points in eastern Alabama which Motor Lines admittedly had not served in the past; and that St. Louis-Nashville Freight Lines, Inc., would be deprived of its present interline tonnage with Motor Lines as a result of the transaction.

Applicant contends in his exceptions, principally that if, as found by the examiner, a need exists for the continuation of Motor Lines' satisfactory service to the public, then it surely must be consistent with the public interest to maintain that service on a sound financial basis; that Motor Lines' financial condition has fluctuated over the years and it recently encountered difficulty in securing loans; that although its present officers are competent in their respective fields, it needs overall management with adequate financial resources, purchasing power, and the know-how which he can furnish; that prior to the instant agreement Hayes and Motor Lines interlined with each other and with other carriers substantial traffic moving to and from points in their respective territories; that the Commission has given consideration in other cases to traffic transported by applicants therein subsequent to the execution of a contract between them or under temporary authority, and has approved applications although the operations of the seller were sporadic and the parties had not previously interlined traffic with each other; that, in the instant proceeding, the traffic interlined by Hayes and Motor Lines after the date of the agreement and the increase in the tonnage of frozen citrus products transported by them, evidences a public need for continuation thereof; that a single-line service or a coordinated interline service would not be a new operation and not equivalent to a grant of operating authority requiring proof of public convenience and necessity; that the mere fact that some increase in competition may result is not grounds for denial of the application; that the so-called "new service" is a service which Hayes and Motor Lines have performed in the past and which they would be able to provide in the future regardless of the action taken herein; that such service would be little different from the coordinated service of certain protestants; and that evidence of shipper witnesses and proof of public convenience and necessity are unimportant where the issue is whether the transaction is consistent with the public interest.

Applicant further contends that Motor Lines' authority to serve points in eastern Alabama is limited to the transportation of frozen foods and packinghouse products to, and cotton mill products from, those points; that there is no substantial movement of frozen foods and packinghouse products to those points; that it solicited traffic from such points, advertised its service in such area, and has always picked up traffic at those points when called upon but has not been successful in serving all points; that the transportation of frozen citrus products from Florida points is a seasonal operation and the failure of Motor Lines to secure more northbound traffic is not due to lack of any sales effort; that its efforts to adapt its equipment to the transportation of frozen foods commenced at least 1 year prior to the instant agreement; that its holding out to transport frozen concentrates is shown by the fact that it entered into an agreement with 1 protestant for a coordinated interline operation at least 10 months prior to the instant agreement; that it transports substantial refrigerated traffic to the Florida concentrate area and had it been able to secure more northbound traffic it certainly would have transported such traffic, and that the examiner erred in attempting to "atomize" its irregular-route authority by pointing out that 1 specific commodity had not been transported and that certain points had not been served, and ignoring the evidence of holding out, sales solicitation, and actual service rendered under the broad scope of such authority. As to the effect of the proposed operations on the refrigerated carriers, he argues that, from a consideration of the substantial tonnage they have transported, their increased revenues, and general lack of evidence of adverse effect, as compared to the tonnage transported by Motor Lines, it is inconceivable that they would be injured by the instant transaction; that the evidence shows the other motor-carrier protestants are all substantial carriers, well established in their territories and have consistently expanded their facilities and service;

that, with one exception, they all have operating ratios of less than 100 and only one reflected any decrease in tonnage in 1955 as compared to 1954; that none have pointed out any specific traffic they have lost since the execution of the instant agreement and none could give any specific reason for fearing that his control of Motor Lines would adversely affect them; that any diversion of traffic which might result would occur only if an improved service were offered the public and any such diversion would be in the interest of the public; that in many instances diversion is improbable, as any coordinated operations of Hayes and Motor Lines would be over more circuitous routes; that protestants are required to make a specific and definite showing of an actual or potential impairment of their services; that the real issue as to them is not whether they might suffer some diversion of traffic but whether the volume they would lose would be so serious as to impair their future operations; and that they have not met this obligation. He is willing, if we so require, to have approval conditioned on Hayes and Motor Lines continuing and preserving all existing interline arrangements, and to merge Hayes, Motor Lines, and other companies controlled by him, with the exception of Hayes Realty Company.

In their replies, protestants generally argue that the evidence shows that prior to 1955, Hayes and Motor Lines interlined in a period of 25 months, only 220 shipments (8.4 per month), whereas in a 10-week period in 1955 they interlined 189 shipments (75.6 per month); that this factor alone shows a marked change in the relationship of Hayes and Motor Lines after the instant agreement; that in 1954, interline traffic from Motor Lines to Hayes, moved only to points in Illinois, Indiana, Kentucky, Ohio, and Tennessee, whereas in 1955, in addition to those States, traffic moved to points in Colorado, Kansas, Michigan, Minnesota, Missouri, Montana, Oklahoma, Washington, and Wisconsin; that applicant proposes to develop traffic for movement over the lines of Hayes and Motor Lines and to advertise

a coordinated service by such carriers; that regardless of any open door policies, coordinated service policies, and through trailer arrangements, applicant would develop business wherever and however possible for those companies; that the addition of Motor Lines to the carriers presently controlled by him would permit operations by carriers under common control in 18 States; that such operations would be completely different from those now performed and would give him a competitive advantage over other carriers in the area; that his proposal to have the Commission condition approval herein to require that Hayes and Motor Lines continue and preserve existing interline arrangements is unworkable and unenforceable; that, in the past, they have encountered little competition from Motor Lines or from any through services of Hayes and Motor Lines on traffic moving to and from points in their respective areas; that Motor Lines has not transported traffic between Greensboro and Atlanta and between Memphis and Atlanta, whereas such services would result from approval of the instant application; that the 25-percent increase in Motor Lines' traffic proposed under applicant's control would be derived primarily from the transportation of cotton mill products from Alabama points and frozen citrus concentrates from Florida points, whereas the evidence clearly shows only limited operations by Motor Lines in such transportation; that whether carriers previously engaged in interlining traffic with each other or with other carriers is not controlling where a new and different service would result as the evidence must clearly show a need for the new service or that other factors exist which warrant approval of the application; that, in the instant case, where there is no public demand or other factors warranting the proposed new service, any operations of Motor Lines under applicant's control, particularly the little used rights, would result in new competitive services which would disrupt the present competitive situation; that the evidence does not warrant a finding that Motor

Lines' present management is inefficient; that there is no evidence that applicant would be able to improve its financial condition, particularly when consideration is given to the fact that both Hayes and Service are presently not operating profitably under his control; that operations of Motor Lines under its present management were profitable in the first quarter of 1955, a more balanced operation were performed, and it operated to capacity; that, if the present management is so inefficient, why does applicant propose to retain them in their present capacity if the transaction is approved; and that there is no evidence showing that Motor Lines may cease operation if the instant application is denied, but, on the other hand, it appears that under present management it can continue to render a profitable service.

Protestants further argue that the evidence amply shows the traffic they are moving in and out of the territory involved and which would be subject to diversion to the coordinated operations of Hayes and Motor Lines; that any increase in the volume of Motor Lines' traffic can only be brought about by the diversion of traffic from existing carriers as there is no evidence showing that any new traffic would be generated or that existing facilities are inadequate to handle the present traffic volume; that all evidence of record is admissible for considering the adverse effect upon existing carriers, regardless of whether certain carriers have withdrawn their objections, and that, in this respect, such evidence shows that the refrigerated carriers would lose traffic if the anticipated increase in Motor Lines' traffic is realized; that every pound of freight interlined between St. Louis-Nashville Freight Line and Motor Lines is traffic that Hayes would be able to transport in the coordinated operation; that it is illogical to assume that applicant would not attempt to divert such traffic through solicitation or otherwise; that the fact the two shippers controlling this traffic have indicated that they would not change present routing is no safeguard,

considering the type of service which would be made available to them by the Hayes-Motor Lines service; that while approval of the transaction may not result in their cessation of operations, it would make vulnerable substantial portions of the areas in which they operate; that they are not required to state with absolute accuracy the traffic which they would lose; that applicant is attempting to place an impossible burden on them by detailing the traffic which they might lose, whereas the Commission, in prior decisions, only has required that protestants show that they would be adversely affected if new operations were to be instituted; and that the fact that they have expanded their facilities and services and are now operating in the black is meaningless when their operations generally are marginal, and any loss of traffic could result in deficit operations. They further argue that the fact that they are adequately serving the area and meeting all transportation requirements is shown by the testimony of Motor Lines' representative that it solicited the transportation of cotton mill products from Alabama points and frozen citrus concentrates from Florida points without success, and of the shipper witnesses that they have found existing services adequate and have little complaint in regard thereto; that the transaction should be approved only if definite public benefits will result, whereas the evidence only shows that a continuation of the existing service of Motor Lines is proposed; that the fact applicant may have certain valued investments is not the criterion for finding he has ample liquid assets to meet present obligations, much less those he would incure herein; that there is no showing that he can get the necessary funds from Hayes, Service, or through disposition of his investments; that the purchase price is excessive; that after entering into a binding contract with the controlling stockholder of Motor Lines, applicant is now attempting to pressure the Commission into approving the application; that Hayes is not presently serving all its authorized points, but is

evidently limiting its service to long-haul profitable traffic; and that it is not in the public interest to permit an extension of its operations in such a manner that it could reach new sources of long-haul truckload traffic.

There appears to be little doubt that applicant has had considerable experience in the overall management of motor carriers, and it is reasonable to assume that were he to acquire control of Motor Lines, his experience would be of value to that carrier. It is also apparent that his control of Motor Lines in common with Hayes and Service would benefit it through participation in volume purchasing of supplies, equipment, and other essentials and would improve the efficiency and economy of its service by coordinated operations with such carriers. His ability as a manager cannot be judged on the basis that Service operated at a loss in 1953 and 1954, as his control of that carrier did not commence until December 1954. As to Hayes, its losses in 1954 were substantially lower than those in 1953, and he has stated that certain rehabilitation of its operations had been going on during those periods and that it was expected the carrier would thereafter operate at a profit. His personal balance sheet discloses a net worth of about $743,000 which, in our opinion, is sufficient to indicate an ability to meet his obligations arising from the transaction. One question presented, however, is whether Motor Lines needs additional management in order to perform its motor-carrier service adequately. In this respect, the evidence shows that the present managers of Motor Lines are competent and experienced in their respective fields, and that under their control it has for at least the first 3 months of 1955, conducted a profitable and balanced operation, and it is reasonable to assume that it could so continue to operate in the future. Based on the evidence now of record, there is no adequate showing that overall management by applicant of Motor Lines is required to continue satisfactorily its operations.

The evidence generally shows that Motor Lines interlined substantial traffic with other carriers at Nashville moving to points in the area served by Hayes and that Hayes also interlined traffic at Nashville moving to points served by Motor Lines.

The evidence also shows that prior to 1955, no substantial interline occurred between the two carriers, but that the relationship changed considerably after the instant agreement. While applicant has indicated that if the instant transaction is approved, the present interline arrangements of Hayes and Motor Lines with other carriers would not be disrupted, he has also stated that coordinated operations would be rendered between Motor Lines and the carriers he presently controls; that such a service would be advertised to the public and traffic solicited on such basis, and that he would attempt to develop all traffic possible. It is obvious, therefore, that any traffic which could be routed over a combination of the carriers he controls would be so routed, and if such routing necessitated a change in existing interline routings that factor would not be a deterrent. The evidence of the public witnesses presented by applicants does not indicate a need for any through service between the territories served by any of the carriers controlled by applicant and that served by Motor Lines. The evidence also fails to show that existing carrier service in the area served by Motor Lines is inadequate or that new traffic is available. Whether or not a 25-percent increase in its traffic can be generated is problematical, and the estimate is not substantiated by the record. In any event, it appears that any such increase in traffic would be derived primarily from the transportation of frozen citrus products and to some extent from cotton mill products, and the evidence conclusively shows that Motor Lines has participated only to a limited extent in the transportation of those commodities. The contention that Motor Lines has solicited such traffic without success clearly supports a finding that existing carrier

service in the transportation of these commodities is adequate. Furthermore, the evidence of Motor Lines' past operations fails to show that it has transported to any extent, granite, sugar, coffee, lard and vegetable oil compounds, tallow, peanuts, pickles, pimentos, and pottery, or that it has served certain of its origin points in the transportation of commodities requiring refrigeration. The revitalization of operations under these little used rights evidently is not needed to meet the transportation requirements in the area involved, nor is there any showing that Motor Lines has rendered any service between Atlanta and Greensboro or between Atlanta and Memphis, or that any need exists for the inauguration of such service. If applicant were to acquire control of Motor Lines, its operations in unison with those of Hayes and Service unquestionably would make available to the shippers in such area a transportation service not presently existing, and one which assuredly would result in diversion of traffic from the existing carriers.

The evidence shows that numerous motor carriers serve the areas involved, either directly or through interline, and that some are dependent to a considerable degree, on interline traffic for the continuance of their business. Although certain carriers have withdrawn their opposition to the application, their evidence, together with that of carriers still protesting the application, is pertinent for showing that the present interline service of a number of carriers would be in direct competition, in some instances, with coordinated operations of the carriers controlled by applicant if the application were approved. Most protestants have indicated the volume of their traffic in the considered territory, and although they have not detailed specifically the traffic which they believe would be lost to such proposed operations, their evidence is sufficient to show that they would be adversely affected thereby. The burden of showing that the proposed coordinated operations would meet a public need and would be consistent

with the public interest is upon applicant. In the instant proceeding, that showing has not been made. The showing that Motor Lines' financial stability might be enhanced by the transaction, that there is a need for the continuation of its operations, and that subsequent to the instant agreement, there has been some increase in the transportation of certain commodities, is insufficient to meet this required obligation.

The instant agreement provided that applicant must accomplish the stock purchase regardless of the outcome of the instant transaction. It is difficult to see that this provision of the agreement can be accomplished without, at the same time, acquiring power to control Motor Lines, in violation of section 5. In view of our conclusion that the application should be denied, applicants will be allowed 90 days from the effective date of our order in which to terminate temporary management by applicant of Motor Lines. During that time, applicant will be expected to divest himself of control of Motor Lines, advising when this has been accomplished.

We find that the proposed transaction would not be consistent with the public interest, and that the application, accordingly, should be denied.

An appropriate order will be entered.

MITCHELL, *Commissioner*, dissenting:

Initially, it is my opinion that the report lends too much significance to the majority finding that "there is no adequate showing that overall management by applicant of Motor Lines is required to continue satisfactorily its operations." While it is true that a finding to the contrary would be entitled to serious consideration, as a matter tending to establish consistency with the public interest, the conclusion of the majority, with which I am not in full accord, to the effect that the record does

not show a need for applicant's overall management, should not be distorted into an additional positive ground for denial. A finding that Motor Lines' present management is competent, does not, in any manner, render the transaction inconsistent with the public interest.

The record establishes that both Hayes and Motor Lines have interlined substantial tonnage at Nashville with numerous carriers, and that, since 1952, a portion of that tonnage has moved in the joint-line service of Hayes and Motor Lines. It follows that continued coordinated service by Hayes and Motor Lines would not be a new competitive service as found by the majority. The fact that the common control of these carriers by applicant would result in the expansion of an existing interchange arrangement between two carriers which are well established and actively in operation in their respective territories, requiring some realignment of interchange arrangements among other carriers, with a possible loss of some tonnage handled under previous arrangements, does not warrant denial of the application. In this connection, it is of particular significance to note that, in addition to a number of other protestants, St. Louis-Nashville Freight Lines, Inc., one of Motor Lines' principal connections at Nashville, has withdrawn its opposition to the transaction.

The evidence submitted herein with respect to the scope of the operations of Motor Lines is admittedly representative and does not purport to be, and is not required to be, all embracive of past operations. The record establishes a representative and continuous service, and it is grossly inequitable, in this or any proceeding under section 5, to pulverize a carrier's operations and require a showing of uninterrupted service on all commodities, between all points. There is sufficient evidence that the carrier solicits and accepts all traffic offered within the scope of its operating authority. Whether or not there would be increased solicitation with respect to any particular phase of the

carrier's operations, is a matter for decision by its management. The record is not persuasive that protestants would be particularly harmed by, or require protection from, any different policy of operation that might be inaugurated by a new management.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 3rd day of June, A. D. 1957.

No. MC-F-5927

DAVID H. RATNER—CONTROL—TOMPKINS MOTOR LINES, INC.

Upon further consideration of the record in the above-entitled proceeding, and of

(1) Applicant's petition, dated February 15, 1957, for reconsideration of the report and order of December 12, 1956, by division 4; and

(2) Separate or joint replies dated on and after March 7, 1957, of protestants (a) eastern territory railroads, and (b) nine motor carriers; and

It appearing, That the matters set forth in the petition have been considered by division 4 and discussed in its report, and that no facts or arguments have been presented which warrant reopening the proceeding for reconsideration:

It is ordered, That the petition be, and it is hereby, denied.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

Indorsed Filed December 23, 1957
G. W. Schwaner, Clerk

IN THE UNITED STATES DISTRICT COURT SOUTHERN OF ILLINOIS
SOUTHERN DIVISION

Civil Action No. 2371

DAVID H. RATNER, *Plaintiff*

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants*

Before Major, Circuit Judge, and Briggle and Mercer, District Judges

MERCER, District Judge. The plaintiff herein has attacked a number of the findings of the Interstate Commerce Commission. Many of these, in the Court's opinion, are of a minor nature and unimportant. The only contention of plaintiff which is substantial as affecting validity of the order is the one that charges the Commission of deciding the case on the theory that the applicant must offer proof of public convenience and necessity as set forth in Section 207 of the Interstate Commerce Act rather than proof that granting of the application will be "consistent with the public interest" as those words are used in Section 5 of the Act. The report of the Commission contains the following, "The burden of showing that the proposed coordinated operations would meet a public need and would be consistent with the public interest is upon applicant." The use of these words in the order are unfortunate and do not correctly state the law, but should this case be decided upon a mere play of words? The Court should not ignore the findings of the Commission that the proposed acquisition of control would create a new service in an area already adequately served by motor carriers, and that such a new service could draw additional traffic only from existing carriers to the detriment of said existing carriers.

Such a result may not properly be found to be consistent with the public interest. The term "public interest" as used in Section 5 clearly embraces the interest of competing carriers. Their interest and that of the general public is the same in preventing uneconomic transportation. The entry of plaintiff into the area would disrupt the competitive balance with harmful effect on the competing carriers without compensatory benefits to the public, and would not foster sound economic conditions in the industry. Accordingly, the transaction has not been shown to be consistent with public interest.

In McLean Trucking Co. v. United States, 321 U. S. 67, the Court discussed the history and development of Section 5 in general and its applicability to motor carrier consolidations. In the case the Court said "Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in the creation of monopolies. To prevent the latter effect and to make certain that the former was permitted only where appropriate to further the national transportation policy, it placed in the Commission power to control such developments. The national transportation policy requires the Commission to promote economical service and foster sound economic conditions in transportation and among the several carriers. The preservation of independent and competing motor carriers unquestionably has bearing on the achievement of those ends. Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy.

In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which

will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.

The wisdom and experience of that Commission, not of the courts, must determine whether the proposed consolidation is consistent with the public interest. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function (meaning the court's function) to upset its order."

It is the opinion of the Court that in the present case the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence. We do not feel constrained to set aside the order of the Commission and

IT IS, THEREFORE, ORDERED that the Complaint herein be dismissed.

BRIGGLE, District Judge, dissenting: I think it obvious that the Commission proceeded on an erroneous basis and imposed on plaintiff a burden not warranted by the Act. I cannot close my eyes to the fact that this of necessity affects the integrity of their findings and order. I, therefore, respectfully dissent.

Order Entered December 23, 1957

Opinion of Court filed. Findings and Judgment for defendants. Complaint and cause of action dismissed at Plaintiff's costs. Stay of execution to February 1, 1958 (above by a Three-Judge Court with Judge Briggle dissenting).

APPENDIX B

Statutes Involved

Sections 5(2)(a), (b) and (c)
of the Interstate Commerce Act
[49 U.S.C. Sections 5(2) (a), (b) and (c)]

5(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under sub-paragraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Com-

mission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed

transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 207(a) of the Interstate Commerce Act [49 U.S.C. Section 307 (a)]

207(a) Subject to section 210, a certificate shall be issued to an qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other that a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Proof of Service

I, David Axelrod, attorney for David H. Ratner, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of February, 1958, I served copies of the foregoing Jurisdictional Statement on the following parties:

1. On the United States, by mailing a copy, in a duly addressed envelope, with postage prepaid, to John B. Stoddart, Jr., Esquire, United States Attorney, and to Marks Alexander, Esquire, Assistant United States Attorney for the Southern District of Illinois, at the Federal Building in Springfield, Illinois; and by mailing copies thereof in duly addressed envelopes, with air mail postage prepaid, to the Solicitor General, and to Victor R. Hansen, Esquire, and Robert Burk, Esquire, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to James Y. Piper, Esquire, its Assistant General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Central Motor Lines, Inc., Hennis Freight Lines, Inc., and Hoover Motor Express Company, Inc., by mailing copies in duly addressed envelopes, with

air mail postage prepaid, to their respective attorneys of record, as follows:

To: Mack Stephenson, Esquire
208 E. Adams Street
Springfield, Illinois

To: Walter Harwood, Esquire
Nashville Trust Building
Nashville 3, Tennessee

.....

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39 South LaSalle Street
Chicago, Illinois

Attorney for Plaintiff-Appellant

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IN THE

Supreme Court of the United States

October Term, 1957

DAVID H. RATNER, *Appellant*,

v.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,

and

HOOVER MOTOR EXPRESS CO., INC., ET AL., *Appellees*.

On Appeal from the United States District Court for the Southern District of Illinois, Southern Division

BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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IN THE

Supreme Court of the United States

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No. 819

DAVID H. RATNER, *Appellant*,

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THE UNITED STATES OF AMERICA,
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and

HOOVER MOTOR EXPRESS CO., INC., ET AL., *Appellees*

On Appeal from the United States District Court for the Southern District of Illinois, Southern Division

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BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, appellant submits this brief in opposition to the motions to affirm filed in this case by the United States of America, the Interstate Commerce Commission, and Hoover Motor Express Company, Inc., appellees. The points raised by such motions are duplicative and, therefore, both motions will

be dealt with jointly herein. Essentially, the motions raise two issues, as follows:

1. Did the Interstate Commerce Commission exceed the limits of its statutory or discretionary powers when it found, in a proceeding under Section 5 of the Interstate Commerce Act: "The burden of showing that the proposed coordinated operations *would meet a public need and* would be consistent with the public interest is upon applicant"? (Emphasis added).

2. If the foregoing finding did exceed the Commission's statutory and discretionary powers, do its remaining findings cure this error?

This brief will be addressed to these two questions.

1. The Assailed Order Exceeds the Commission's Statutory and Discretionary Powers

Section 5(2)(b) of the Interstate Commerce Act, under which the order in question was entered, provides, so far as here pertinent, that:

> If the Commission finds that . . . the proposed transaction . . . will be consistent with the public interest, it shall enter an order approving and authorizing such transaction . . . .

Purporting to act under the above-quoted statutory authority, the Commission found, as a matter of law, that:

> The burden of showing that the proposed coordinated operations *would meet a public need and* would be consistent with the public interest is upon applicant. (J. St. 12a, 13a), (Emphasis added).

On its face, the foregoing finding imposes a burden of proof far more onerous than that required by the statute. Although the three-judge district court sustained the Commission's order on other grounds, the majority found that: "The use of these words in the order are unfortunate and do not correctly state the law . . ." and District Judge Briggle, in his dissenting opinion stated:

> I think it obvious that the Commission proceeded on an erroneous basis and imposed on plaintiff a burden not warranted by the Act. I cannot close my eyes to the fact that this of necessity affects the integrity of their findings and order. I, therefore, respectfully dissent.

Thus, the language of the statute, as well as the opinion of both the majority and the minority in the court below, make it plain that there is no express statutory authority for the Commission's finding. If authority exists, it must be found in the indefinite realm of administrative discretion. We shall undertake to show that the imposition of the added burden of proof contemplated by the assailed finding exceeds the permissible limits of administrative discretion.

First, let us examine the cases cited by appellees which are alleged to portray "circumstances like those here", and to uphold the proposition that the Commission may require proof of public need in a proceeding under Section 5 of the Interstate Commerce Act.

The first case cited is *Seltzin* v. *United States*, 102 F. Supp. 320, affirmed, 343 U.S. 944. Approval of this application by the Commission would have resulted in conversion of the vendor's operating authority from "irregular route" authority to "regular route" au-

thority. Regular route carriers and irregular route carriers are classified as separate and distinct types of carriers for purposes of regulation under the Interstate Commerce Act. See *Classification of Motor Carriers of Property*, 2 M.C.C. 703. For a carrier to convert from irregular route authority to regular route authority requires proof of public convenience and necessity. See *Transportation Activities, Brady Transfer & Storage Co.*, 47 M.C.C. 23, sustained 80 F. Supp. 110, affirmed, 335 U.S. 875. In the circumstances, the Commission quite properly held, and the court quite properly sustained it in holding, that in addition to the question whether the proposed acquisition of the operating rights involved by Schein's Express would be consistent with the public interest, there was also to be considered the collateral question of the conversion of those rights from irregular to regular routes, and that as to the latter, proof of public need was required. The Commission's authority to decide collateral questions of public convenience and necessity arising as an incident to applications under Section 5 of the Act is considered and explained in *C. & D. Motor Delivery Co.—Purchase—Elliott*, 38 M.C.C. 547; and in *Pacific Greyhound Lines—Control and Merger*, 56 M.C.C. 415.

From the foregoing it will be seen that the circumstances of the *Schein* case were quite unlike those of the present case, and that, read in its proper context, the court's decision does not hold that proof of public need may be required in a proceeding governed solely by Section 5 of the Act.

The other two cases cited by appellees are *Houff Transfer* v. *United States*, 105 F. Supp. 851, and *Herrin Transportation Co.* v. *United States*, 108 F. Supp. 89,

affirmed 344 U.S. 925. In the latter case, which was decided by the district court in September, 1952, it was shown that the vendor was bankrupt, had ceased operations entirely in December, 1946, and that no operations had been conducted under the certificate sought to be transferred since that date. In other words, the operating rights sought to be transferred had been completely dormant for more than five years. The Commission held that in these circumstances, revival of this operation through transfer of the dormant certificate to another carrier would be tantamount to the institution of an entirely new service, and that it would not authorize such a transfer in the absence of evidence showing a need for such new service. In sustaining the Commission's order in this case, the court did *not* consider or discuss the question whether the Commission exceeded its authority in requiring proof of "need", but merely found that the Commission's order had a rational basis, and was predicated on adequate findings supported by evidence. So far as appears, the issue raised by the present appeal was neither raised nor considered in the *Herrin* case.[1]

It also should be noted, in contradistinction to the dormancy which was the outstanding feature of the *Herrin* case, that Tompkins Motor Lines, the vendor herein, handled over 50 million pounds of freight in the

[1] In fact, the plaintiffs in the *Herrin* case were in no position to raise this issue because after the examiner had found an abandonment or discontinuance of operations they requested a further hearing in which they undertook to show that public convenience and necessity existed for the proposed revival of operations. Thus, the findings of the Commission with respect to public need were directly responsive to the issues presented at the hearing by the applicants.

year preceding the filing of this application, of which approximately 27 percent was interchanged with connecting motor carriers, and earned a gross revenue of $859,196. There is, therefore, a substantial factual dissimilarity which renders the principle of the *Herrin* case inapplicable.

The remaining case cited by appellees, *Houff Transfer* v. *United States,* is similar in facts and in principle to the *Herrin* case discussed above. In this case, although the rights sought to be transferred were not entirely dormant, they were so little used that approval of the transaction under consideration obviously would have resulted in the establishment of an entirely new service. Here too, as in the *Herrin* case, the court was not called upon to decide, and did not decide, whether the Commission might lawfully invoke the doctrine of public need in a proceeding under Section 5 of the Act. Instead it merely decided that the Commission had taken into consideration all pertinent factors and properly arrived at the conclusion that the transfer for which approval was sought would result in a new service bearing little resemblance to the service theretofore available under the seller's rights, there being a total lack of evidence that such new service would be consistent with the public interest.

The question whether "public need" must be proven in proceedings under Section 5 of the Act has been squarely presented, considered, and decided in only two cases prior to the present one. Those cases are *M. & M. Transportation Co.* v. *United States,* 128 F. Supp. 296, affirmed, 350 U.S. 857, and *Anderson Motor Service* v. *United States,* 151 F. Supp. 577. Each of these decisions was by a three-judge district court, and

each held unequivocally that "public need" was not a requisite element of proof in proceedings under Section 5 of the Interstate Commerce Act. Therefore, the weight of decisional authority sustains appellant's position and the opinion of the court below serves but to emphasize the need for an authoritative resolution of this question by this Court.

The Government undertakes to distinguish both of the foregoing cases on the ground that proof of public demand "may be essential if the proposed service constitutes a serious threat to competitors, but not essential if there is no such threat"; and also on the ground that "in the cited cases, the Commission in effect found that the applicant had shown that there existed a public need for the service proposed". Thus, the government in its motion, like the Commission in its variety of inconsistent opinions, seems unable to make up its mind as to where a showing of public need is or is not an essential element for a showing of consistency with public interest. Indeed, the government's position seems to be in effect that the Commission is free to insist upon the requirement of a showing of public need when it is disposed to deny an application under Section 5(2), and to dispense with such a showing when it is disposed to grant an application. No position could be better calculated to encourage arbitrary and virtually unreviewable administrative action.

Actually, the relevant and undisputed facts in the present case are closely similar to the facts in the *M. & M.* and the *Anderson* cases. Here, as there, the only change in service proposed is a better coordinated interline operation, referred to in the *M. & M.* case as a "unified service, operated more efficiently", and in the *Anderson* case as an "improved

service to the public". (See government motion, Page 8, Note 2). Nor can the cases be distinguished on the ground that in the cited cases, the Commission found that competing carriers were strong enough to withstand the more vigorous competition which would result from the improved service, but made no such finding in the present case. The significant point is that in the present case it made no affirmative finding that competing carriers were *not* strong enough to withstand increased competition. Its vague reference to possible adverse effects does not rectify this omission, nor does it provide a tangible basis for distinguishing this case from the cases cited.[2] Indeed, it but serves to illustrate the manner in which the Commission plays ducks and drakes with the requirements of the statute and the rights of the parties before it, making specific findings in one case, where that suits its purpose; in other cases, where the record will not support the type of findings it desires to make, resorting to inconclusive inferences and intimations, as it has done here.

In addition to the decisions discussed above, which clearly hold that proof of public need may not be required in a proceeding arising under Section 5(2) of the Act, the language of the statute itself severely limits the permissible range of the Commission's discretion in interpreting the meaning of the phrase "consistent with the public interest" as used in Section 5 of the Act. Throughout the Act, the Congress has used

[2] In this connection, it is ironic to note that the principal protestants who handled a substantial amount of interline traffic with Motor Lines and were consequently the only ones who could be substantially affected by the improved coordination between Hayes and Motor Lines, withdrew their opposition after the hearing.

other language, imposing varying degrees of proof in the case of different types of applications. For example, to obtain a certificate initially, a carrier must prove not only that it is fit, willing and able properly to perform the service proposed, but that the service proposed *"is or will be required by the present or future public convenience and necessity"*. (Section 207 (a)).

In establishing through routes between railroads, and between railroads and water carriers, the Commission is authorized to impose certain requirements if it finds that the through route proposed to be established *"is needed in order to provide adequate and more efficient or more economic transportation"*. (Section 15(4)).

In times of emergency, the Commission is authorized to establish temporarily such through routes as in its opinion *"are necessary or desirable in the public interest"*. (Section 15(4)).

Even in proceedings under Section 5 of the Act, with which we are directly concerned, two different degrees of proof may be required. Whenever a railroad is a party to a proposed transaction under Section 5 which also involves a motor carrier, the Commission must find, not only that the transaction would be consistent with the public interest, but also that it "... *will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition*". (Section 5(2)(b)).

Clearly the Congress intended some distinction between the quantum of proof required in the several circumstances outlined above. If it had not, it could readily have used the same language throughout all

Sections of the Act. This being so, it does not lie within the permissible limits of administrative discretion so to interpret any one of these several standards as to impose a burden of proof as great as that imposed by another, more onerous standard. To do so is, in effect, to substitute the latter for the former, a prerogative which is reserved exclusively to the Congress.

The point is aptly summarized in terms of the case at bar, in the decision of the district court in *M. & M. Transportation Co.* v. *United States, supra.* In that case it was urged that the Commission had erred in *failing* to require proof of public need. In footnote 4 of its decision, the court held:

> The distinction between Section 5's "consistent with the public interest" and Section 207's "public convenience and necessity" disposes of the contention as to a finding of public need. And even within Section 5, it is evident that Congress intended a distinction between "public interest" and "public advantage". Petitioners' argument that the Commission must find the existing service inadequate in a Section 5 proceeding has been rejected by the Supreme Court. (Citing *McLean Trucking Company* v. *United States,* 321 U.S. 67, 86-87).

For the several foregoing reasons, it is submitted that the Commission has neither express statutory authority nor permissible discretionary power to impose the test of "public need" as a requisite of proof under Section 5 of the Act. Even the court below, which sustained the Commission's decision on other grounds, held that in this respect, the Commission's report *did not correctly state the law.*

2. The Commission's Remaining Findings Do Not Cure This Basic Error

The Commission's flagrantly erroneous finding that the burden was upon applicant to show that the proposed transaction "would meet a public need" was lightly dismissed by the court below with the rhetorical question: "Should this case be decided upon a mere play of words?" The court went on to state that the Commission had made other findings adequate to sustain the conclusion that the proposed transaction would not be consistent with the public interest. In their motions to affirm the decision of the district court, appellees stress this same argument: That the Commission's report, considered as a whole, adequately sustains the conclusion reached.

In the light of this argument we turn to the Commission's other findings which are alleged to sustain its ultimate decision. In considering these findings, the Court is urged to bear in mind the warning expressed in the dissenting opinion of Judge Briggle:

> I think it obvious that the Commission proceeded on an erroneous basis and imposed on plaintiff a burden not warranted by the Act. I cannot close my eyes to the fact that this of necessity *affects the integrity of their findings and order.* (Emphasis added).

Apart from the Commission's ultimate finding regarding appellant's burden of proof which has previously been quoted, there are eight other findings which bear upon the denial of the application. These are quoted below and are assigned numbers to facilitate reference to them in the discussion which follows.

> 1. The evidence shows that the present managers of Motor Lines are competent and experienced

in their respective fields, and that under their control it has for at least the first 3 months of 1955, conducted a profitable and balanced operation, and it is reasonable to assume that it could so continue to operate in the future. (J. St. 10a).

2. The evidence generally shows that Motor Lines interlined substantial traffic with other carriers at Nashville moving to points in the area served by Hayes and that Hayes also interlined traffic at Nashville moving to points served by Motor Lines.

   The evidence also shows that prior to 1955, no substantial interline occurred between the two carriers, but that the relationship changed considerably after the instant agreement. (J. St. 11a).

3. If applicant were to acquire control of Motor Lines, its operations in unison with those of Hayes and Service unquestionably would make available to the shippers in such area a transportation service not presently existing, and one which assuredly would result in diversion of traffic from the existing carriers. (J. St. 12a).

4. . . . the present interline service of a number of carriers would be in direct competition, in some instances, with coordinated operations of the carriers controlled by applicant if the application were approved. Most protestants have indicated the volume of their traffic in the considered territory, and although they have not detailed specifically the traffic which they believe would be lost to such proposed operations, their evidence is sufficient to show that they would be adversely affected thereby. (J. St. 12a).

5. Based on the evidence now of record, there is no adequate showing that overall management

by applicant of Motor Lines is **required** to continue satisfactorily its operations. (J. St. 10a).

6. The evidence of the public witnesses presented by applicant does not indicate a **need** for any through service between the territories served by any of the carriers controlled by applicant and that served by Motor Lines. (J. St. 11a).

7. The evidence also fails to show that existing carrier service in the area served by Motor Lines is **inadequate** or that new traffic is available. (J. St. 11a).

8. The revitalization of operations under these little used rights evidently is not **needed** to meet the transportation requirements in the area involved, nor is there any showing that Motor Lines has rendered any service between Atlanta and Greensboro or between Atlanta and Memphis, or that any **need** exists for the inauguration of such service. (J. St. 12a).

In the four findings last-quoted above, bold face type has been used to emphasize the constant reiteration of the word "need" or other words connoting "need". *Four of the eight findings quoted above are based expressly upon the erroneous concept that appellant was under an obligation to prove that there was a public need for approvel of the proposed transaction.* The Commission's misconception of the law permeates its report and critically "affects the integrity" of its findings.

Without unduly belaboring the subject, we wish to comment briefly upon some of the above-quoted findings of the Commission.

Finding No. 1 states no ground for denying the application. It merely states that Motor Lines was

operating at a profit. This is no legal impediment to its sale; the Act does not contemplate that a carrier must be in financial distress before it may be sold.

Finding No. 2 states no ground for denying the application unless the Commission intends to overrule all of its prior decisions on this point. The Commission has repeatedly held that where two applicants have both participated substantially in the movement of interline traffic, the fact that they *could* have interchanged such traffic with each other, whether they did so or not, precludes a finding that their combined service would be substantially new or different from that which they had previously performed individually. See *G. & M. Motor Transfer Company, Inc. Common Carrier Application,* 43 M.C.C. 497; *Michigan Express, Inc.—Purchase—Williams,* 45 M.C.C. 211; *Hubert—Purchase—Service Freight Lines,* 45 M.C.C. 717; *C. A. Conklin Truck Line, Inc.—Purchase—Wilhelm Transport Co.,* 59 M.C.C. 763; and *Warwood Transfer Co.—Purchase—T. A. Scott and John E. Armstrong,* 65 M.C.C. 1.

Findings Nos. 3 and 4 are to the effect that approval of the application would make available a transportation service not presently existing (which is contrary to the holding of the decisions cited above) and that such service would result in diversion of traffic from existing carriers who would be adversely affected thereby.

Whenever two carriers merge, or, as here, coordinate their services, there is bound to be some displacement of existing traffic patterns. This was recognized, with approval, by the district court in the *M. & M.* case, supra, which stated in footnote 4 of its decision:

> Lastly, it would not seem that the creation of a new service would be inconsistent with the public interest—on the contrary, it might greatly benefit the public. If petitioners' argument were to prevail, acquisitions would be limited to those involving non-contiguous carriers, or carriers which substantially interchanged all through traffic with one another.

In *Quinn Freight Lines—Purchase-Wadkins*, 58 M.C.C. 801, sustained, 114 F. Supp. 558, affirmed 346 U.S. 890, 347 U.S. 908, the Commission held that:

> The fact that vendee, an aggressive carrier, will divert some traffic from competitors, standing alone, is no bar to approval of the application.

The ultimate test to be applied is that which is spelled out in Section 5(2)(c) of the Act, i.e.: "The effect of the proposed transaction upon adequate transportation service to the public". A mere finding that some diversion of traffic may occur, unaccompanied by a finding that adequate transportation service to the public will thereby be impaired is not sufficient to sustain denial of an application. By the Commission's own admission that the protestants did not detail specifically the traffic which they believe would be lost, the evidence before it was not sufficient to enable it to make such a finding.

It is not so much the purpose of the foregoing discussion to argue the merits of the four findings considered, as it is to point out and to emphasize the fact that, standing alone, they are plainly inadequate to sustain the Commission's ultimate conclusion that the application should be denied. The Commission's ultimate conclusion depends upon the remaining four findings quoted above for a complete statement of the

grounds for denial. But, as shown, those remaining findings are, in turn, predicated upon the legal misconception that it was appellant's burden to prove the existence of a public need for approval of the proposed transaction. Thus, if the Court agrees that the Commission's crucial finding respecting appellant's burden of proof is in error, as the court below held that it was, then, for the same reason, the findings numbered 5 through 8 above must fall, and not enough will then remain to sustain the Commission's decision. The error in the Commission's decision cannot be dismissed as a "mere play of words". It is fundamental. It permeates the entire report and invalidates many of the subordinate findings upon which the Commission's ultimate conclusion must depend.

It is also noteworthy that the government's motion does not undertake to show how the subordinate findings of the Commission, if divorced from the concept of public need, could reasonably be thought to support its ultimate conclusion that applicants had failed to establish consistency with the public interest. Instead, the government relies upon the district court's finding that "entry of plaintiff into the area would disrupt the competitive balance with harmful effect on the competing carriers without compensatory benefits to the public, and would not foster sound economic conditions in the industry". This, the government *further* interprets as "absence of proof of any advantage flowing to shippers from the changed character of operations ensuing from bringing Motor Lines under appellant's control". (See Page 6 of government motion).

Entirely apart from an examination of the record, which certainly contains proof of the advantages that would flow to shippers from the coordinated operations,

one can search the opinion of the Commission minutely without discovering any justification for the findings attributed to it by the district court's opinion and the government's motion. Indeed, the very assumption that the appellant's control of Motor Lines would offer a greater threat to competitors suggests that the applicant would be offering an improved service to the public as compared with that offered by Motor Lines independently. The failure of the Commission to face up to these issues as demonstrated by the complete absence of findings either with respect to improved service to the public, or the seriousness of damage to competitors cannot now be supplied either by the unsupported assumptions of the district court's opinion or the bald assertions of the government's motion. This Court has frequently announced and applied the salutary principle "that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained". *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 95. And, as this Court said in *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489. "If an erroneous statutory conclusion lies hidden in vague findings, then statutory rights will be whittled away. Insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain".

CONCLUSION

In *McLean Trucking Company* v. *United States*, 321 U.S. 67, this Court recognized that it was the policy of Congress to encourage "the organization of stronger units in the motor carrier industry". It stated that consolidations of motor carriers were not to be limited

to those instances where present service is shown to be inadequate, for to do so:

> . . . would ignore the fact that the Motor Carrier Act is to be administered with an eye to affirmatively improving transportation facilities, not merely to preserving existing arrangements or competitive practices.

It is true that in the *McLean* case the Court also recognized the duty of the Commission to consider the effect of a proposed merger on competitors and on the general competitive situation in the industry. Appellant does not deny that the Commission can and should consider the competitive effect of any merger or consolidation or other transaction under Section 5 of the Act. However, this does not give the Commission the right to impose standards of proof above and beyond those specified in the Act. This is neither administration nor adjudication—it is legislation, a power which the Commission does not possess.

The principle involved was considered and decided by the Court fifty years ago in *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U.S. 452,—a landmark case dealing with the doctrine of administrative finality. At Page 470 of its report the Court enumerated the matters to be considered in determining whether an order of the Commission should be suspended or set aside. Among these was the following:

> . . . whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule

> that the substance, and not the shadow, determines the validity of the exercise of the power.

This statement—made by the Court fifty years ago—aptly characterizes the present case. Although purporting to act within the confines of a delegated power, in substance, the Commission has sought to impose a burden of proof far greater than that imposed by the statute, and thus, has gone far beyond the limits of the statutory power conferred upon it. If its decision is sustained, the effect will be to confirm in the Commission the arbitrary power to deny any application under Section 5 in which stark and absolute necessity cannot be proven. Obviously such a result is not compatible with the intent of Congress to encourage the unification of motor carriers and the assertion of such a power by the Commission presents a question of critical importance which not only warrants, but requires, consideration by this Court.

Wherefore, for the reasons stated, the motions to affirm should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 819

DAVID H. RATNER,

Appellant,

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

MOTION TO AFFIRM

Appellee, Hoover Motor Express Co., Inc., pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, move that the final judgment of the district court be affirmed.

Statement

This is a direct appeal from a final judgment, entered on December 23, 1957, by a three-judge court convened pursuant to 28 U.S.C. 2325, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission.

Appellee, Hoover Motor Express Co., Inc., is a Tennessee corporation and a common carrier for hire via motor

vehicles, operating in interstate and foreign commerce pursuant to certificates of convenience and necessity issued by the Interstate Commerce Commission. Appellee, Hoover, was a party to the proceedings before the said Commission, and before the District Court.

Extensive hearings lasting for more than a week, were held in connection with the application. The Examiner who heard the case recommended denial of the application. In passing upon the exceptions taken to the Examiner's Report, Division 4 of the Commission overruled the exceptions and likewise denied the application. Applicant thereupon filed a petition for reconsideration by the full Commission of the decision and order of Division 4, and this petition was also denied by the full Commission. The District Court rejected the arguments and contentions of appellant and dismissed the complaint.

Appellee respectfully submits that the appellant's appeal in this case fails to present a substantial question, and that the decision of the lower Court should be affirmed, and the appeal dismissed.

Argument

Appellant's entire case has been built upon a mere "play of words" and upon an extreme and unwarranted construction of one statement contained in the Commission's decision and to which reference is made in the District Court's decision. The District Court stated:

> "The report of the Commission contains the following, 'The burden of showing that the proposed coordinate operations would meet a public need and would be consistent with the public interest is upon applicant.' The use of these words in the order are unfortunate and do not correctly state the law, but should

this case be decided upon a mere play of words? The Court should not ignore the findings of the Commission that the proposed acquisition of control would create a new service in an area already adequately served by motor carriers, and that such a new service could draw additional traffic only from existing carriers to the detriment of said existing carriers. *Such a result may not properly be found to be consistent with the public interest.* The term 'public interest' as used in Section 5 clearly embraces the interest of competing carriers. Their interest and that of the general public is the same in preventing uneconomic transportation. The entry of plaintiff into the area would disrupt the competitive balance with harmful effect on the competing carriers *without compensatory benefits to the public,* and would not foster sound economic conditions in the industry. *Accordingly, the transaction has not been shown to be consistent with public interest.*" (Emphasis added) (Page 16a, Appendix, Appellant's Jurisdictional Statement)

At page 5 of his Jurisdictional Statement, appellant states:

"Briefly, the applicant, Ratner, sought to show that approval of the proposed transaction would be beneficial to Tomkins Motor Lines *and to the public* by reason of the fact that appellant has the managerial experience and the financial resources to restore the company to a sound position and to operate it successfully, thus assuring it continued operations. Eight witnesses representing shippers who utilize Tompkins' service testified in support of the application, expressing their interest in, and desire to have the service preserved." (Emphasis added)

Appellant wholly failed to prove his contentions, and the Commission made specific adverse findings relative thereto, all of which are abundantly supported by the evidence.

The Commission found, among other things:

1. That for the first three months of 1955 (prior to the instant transaction) Tompkins Motor Lines conducted a profitable and balanced operation,[1] and from all the proof found that it could continue to do so in the future. (Page 10a, Appendix, Appellant's Jurisdictional Statement) (Appellant states at page 4 of his Jurisdictional Statement that the company operated at a loss for the three year period 1952-1954. This does not take into account the uncontradicted proof that Mr. W. H. Tompkins had not actively managed the company, and was incapable of doing so, for approximately thirteen years and had delegated the active management to others (Tr. 1026-1032) or that he drew a salary of $15,000.00 a year for which he did nothing (Tr. 178, 809). Mr. Ratner, the appellant, admitted that, for example, for the year 1954 if Mr. Tompkins' salary were taken into consideration (since he did nothing to earn it) the company would have operated at a profit (Tr. 178)).

2. That the applicant failed to show that his overall management is required to continue satisfactorily the operations of Tompkins Motor Lines. (Page 10a, Appendix, Appellant's Jurisdictional Statement)

3. That prior to 1955 and the transaction involved herein, there was no substantial interline of traffic between the two carriers (Hayes and Motor Lines), but that the relationship changed considerably after the instant agreement. (Page 11a, Appendix, Appellant's Jurisdictional Statement)

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[1] A balanced operation, where the volume of freight handled is approximately equal in all directions, is the ultimate goal towards which all carriers continually strive.

4. That the testimony of applicant's supporting public witnesses failed to show a need or desire for any through service between the territories served by any of the carriers controlled by applicant and that served by Motor Lines. (Page 11a, Appendix Appellant's Jurisdictional Statement)

5. That applicant's evidence fails to show that existing carrier service in the area involved is inadequate, or that any new traffic is available, and that an alleged 25% increase in traffic could be generated is not substantiated by the evidence of record. (Page 11a, Appendix, Appellant's Jurisdictional Statement)

6. That the proposed coordinated service would be in direct competition with the existing carriers in the involved area, and that the operations of the protestants would be adversely affected thereby. (Page 12a, Appendix, Appellant's Jurisdictional Statement)

7. The Commission further found:

> "The instant agreement provided that applicant must accomplish the stock purchase regardless of the outcome of the instant transaction. It is difficult to see that this provision of the agreement can be accomplished without, at the same time, acquiring power to control Motor Lines, in violation of Section 5." (Page 13a, Appendix, Appellant's Jurisdictional Statement)

The statement by the Commission in its Report to the effect that the burden is upon the applicant to show that the proposed coordinated operations would meet a public need and would be consistent with the public interest is but another way of saying that (in view of its findings that the public witnesses did not indicate a need or desire of

the proposed through cooordinated service; the proof did not show that approval is required in order for the continuation of Motor Lines' service to the public; approval would have an adverse competitive effect upon the operations of the protestants) in order for the transaction to be consistent with the public interest, a public need must be shown, that is, some compensating benefits to the public which would overcome or offset the competitive adverse affect upon the operations of the protestants. This is true because, as held by the lower Court, the term "public interest" as used in Section 5 clearly embraces the interest of competing carriers.

The District Court held:

> "In McLean Trucking Co. v. United States, 321 U. S. 67, the Court discussed the history and development of Section 5 in general and its applicability to motor carrier consolidations. In the case the Court said 'Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in the creation of monopolies. To prevent the latter effect and to make certain that the former was permitted only where appropriate to further the national transportation policy, it placed in the Commisssion power to control such developments. The national transportation policy requires the Commission to promote economical service and foster sound economic conditions in transportation and among the several carriers. The preservation of independent and competing motor carriers unquestionably has bearing on the achievement of those ends. Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in

no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy.

In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. Resolving the considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.

The wisdom and experience of that Commission, not of the courts, must determine whether the proposed consolidation is consistent with the public interest. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function (meaning the court's function) to upset its order." (Pages 17a, 18a, Appendix, Appellant's Jurisdictional Statement)

It is respectfully insisted by appellee, Hoover Motor Express Co., Inc., that the District Court properly sustained the Report and Order of the Commission; that it properly refused to dispose of this case upon a "mere play

of words"; and, that the decision of that Court should be affirmed and the appeal dismissed.

Respectfully submitted,

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APPENDIX A

TITLE 49, U. S. Code:

National Transportation Policy

Act Sept. 18, 1940, ch. 722, title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12 and 13 of this title, by inserting before part I thereof (chapter 1 of this title) the following provision entitled 'National Transportation Policy:'

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12 and 13 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act (chapters 1, 8, 12 and 13 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 5. Combinations and consolidations of carriers—Pooling; division of traffic, service, or earnings.

* * * * * * * *

Unification, Mergers, and Acquisitions of Control.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned, or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the

Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others; (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

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No. 819

In the Supreme Court of the United States

OCTOBER TERM, 1957

DAVID H. RATNER, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on December 23, 1957, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325, dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. The order (70 M. C. C. 251), issued pursuant to Section 5 (2) (b) of the Interstate Commerce Act, denied appellant's application for authority to acquire con-

trol of a motor carrier through purchase of its capital stock.

Appellant controls through stock ownership Hayes Freight Lines, Inc. and Service Transfer & Storage, Inc., which will be respectively referred to as "Hayes" and "Service." Hayes is authorized to operate as a regular route common carrier of general commodities in a wide area embracing Chicago and Detroit on the north; Cleveland and Pittsburgh on the east; Memphis and Nashville, Tennessee, on the south; and Davenport, Iowa, Quincy, Illinois, and St. Louis on the west. Service holds authority to operate as a regular route common carrier between Minneapolis, Minnesota, and Eau Claire, Wisconsin, on the north and west, and Milwaukee and Chicago on the east and south.

In 1955, appellant filed an application under Section 5 (2). (b) of the Interstate Commerce Act for approval of his purchase of all the outstanding capital stock of Tompkins Motor Lines, Inc., which will be called Motor Lines. This company is authorized to transport general commodities over regular routes between Nashville and Atlanta and between Nashville and Greensboro, North Carolina. It also holds irregular route authority to transport various specified commodities between Nashville and certain points or areas in North Carolina, South Carolina, Georgia, Alabama and Florida. The application was opposed by 26 motor common carriers, of whom seven later withdrew their opposition, and by rail carriers in eastern territory (J. St. 2a). The transcript of tes-

timony at the hearing comprises over 1500 pages, and 153 exhibits were received in evidence.

The protesting motor carriers urged, among other things, that in the past there has been very little interline operation (via the Nashville junction) between Hayes and Motor Lines; that grant of the application would bring under appellant's control carriers operating in 18 States,[1] and would effect a radical change in the nature of Motor Lines' present service; that the coordinated operations of Hayes and Motor Lines would divert from other carriers traffic moving in and out of the territory involved; that such diversion would make vulnerable substantial portions of the area in which the protesting carriers operate; and that their operations generally are marginal so that a loss of traffic might result in deficit operations (J. St. 6a–9a).

The examiner filed a report recommending denial of the application (J. St. 1a). On appellant's exceptions to his report, Division 4 of the Commission (with one Commissioner dissenting) found that numerous motor carriers, some of whom "are dependent to a considerable degree, on interline traffic for the continuance of their business", serve the areas involved; that the unified operation which would result from grant of the application would adversely affect protesting carriers; that the evidence showed no in-

[1] General commodities could then be transported by carriers under appellant's control between points as far removed as Minneapolis and Atlanta, and particular commodities could move in like manner all the way from southern Florida to Minneapolis.

adequacy in existing carrier service in the area served by Motor Lines or that new traffic is available, and no need for the through service proposed by the applicant; that grant of the application would bring a material change in the character of Motor Lines' service; and that such change "assuredly would result in diversion of traffic from the existing carriers" (J. St. 11a–12a). Based on these and other subsidiary findings, the Commission found that the proposed transaction "would not be consistent with the public interest" (*id.*, 13a). The full Commission denied a petition for reconsideration of the order denying appellant's applications (*id.*, 15a.)

The district court, in sustaining the Commission's order, said (J. St. 16a–17a):

> The Court should not ignore the findings of the Commission that the proposed acquisition of control would create a new service in an area already adequately served by motor carriers, and that such a new service could draw additional traffic only from existing carriers to the detriment of said existing carriers. Such a result may not properly be found to be consistent with the public interest. The term "public interest" as used in Section 5 clearly embraces the interest of competing carriers. Their interest and that of the general public is the same in preventing uneconomic transportation. The entry of plaintiff into the area would disrupt the competitive balance with harmful effect on the competing carriers without compensatory benefits to the public, and would not foster sound economic conditions in the industry.

Accordingly, the transaction has not been shown to be consistent with public interest.

ARGUMENT

Section 5 (2) (a) of the Interstate Commerce Act makes it lawful for a person not a carrier to acquire control of two or more carriers if the acquisition is approved by the Commission as provided in Section 5 (2) (b). That section provides that the Commission shall authorize an acquisition of control coming within the scope of 5 (2) (a) if it finds that the acquisition will be "consistent with the public interest". Appellant's contention that the Commission misinterpreted the statute is grounded on the following sentence in the Commission's report (J. St. 12a–13a): "The burden of showing that the proposed coordinated operations would meet a public need and would be consistent with the public interest is upon applicant". Appellant contends that when the Commission said that "public need" had to be shown, it erroneously applied a "public convenience and necessity" test instead of the statutory test of "consistent with the public interest" (J. St. 7, 11–13, 15).

Resolving the various considerations determinative of the public interest in a proceeding under Section 5 (2) (b) is a "complex task" requiring "expert judgment and considerable knowledge of the transportation industry", and "Congress left that task to the Commission". *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87. Accordingly, the courts may not upset an order entered under that section if the Commission "did not exceed the statutory limits

within which Congress confined its discretion and its findings are adequate and supported by evidence". *Id.*, at 88.

In the instant case, the Commission found that bringing Motor Lines under common control with the two other motor carriers controlled by appellant would result in what was tantamount to the institution of a new service by Motor Lines, and that this change would have a substantial adverse effect on its competitors. These findings furnish ample warrant for the Commission's determination that the proposed acquisition was not consistent with the public interest, at least in the absence of proof that Motor Lines, by virtue of a change in control, would supply some transportation service useful to shippers and not presently available to them—in short, that its new operations "would meet a public need". Appellant had the burden of showing that the proposed acquisition of control would be consistent with the public interest. In view of the evidence and findings of adverse effect on other carriers, he did not sustain this burden when he failed to show that the change in Motor Lines' operations resulting from acquisition of control "would meet a public need". Certainly the Commission, being vested with wide discretion in determining the factors relevant to what is "consistent with the public interest", could give weight to absence of proof of any advantage flowing to shippers from the changed character of operations ensuing from bringing Motor Lines under appellant's control.

In circumstances like those here, the courts have repeatedly held that the Commission may validly re-

ject a proposed acquisition of control upon the ground that public need for the service resulting from the proposed acquisition had not been shown. *Shein* v. *United States,* 102 F. Supp. 320, 326 (D. N. J.), affirmed, 343 U. S. 944, held that the Commission had properly applied the statute when it gave as grounds for finding a proposed acquisition not consistent with the public interest that it would bring about a radical change in the pattern of prior operations, that it probably would adversely affect competitors, and that the evidence failed to show that the acquisition would supply "any need of the public not now being adequately met by other carriers". Similarly in *Houff Transfer* v. *United States;* 105 F. Supp. 851, 854–856 (W. D. Va.), the court held that the Commission had properly concluded that the acquiring carrier's desire to institute what essentially would be a new service, "unsupported by any evidence of the need therefor", does not establish that the transaction is consistent with the public interest. In *Herrin Transportation Co.* v. *United States,* 108 F. Supp. 89, 93 (E. D. La.), affirmed, 344 U. S. 925, rehearing denied, 345 U. S. 914, the grounds given by the Commission for rejecting the Section 5 (2) (b) application were that "no need has been shown for the additional service" proposed, and that the disadvantages resulting from approval of the transaction outweigh the possible benefits. The court held that determination of what is consistent with the public interest, in the light of these opposing considerations, is "peculiarly within the province of the Commis-

sion", and that its order had "a rational basis in adequate findings."

Appellant relies (J. St. 11–14) on two decisions which hold that an order approving an acquisition of control is not invalidated by the absence of a finding *in haec verba* that there is a "public need" for service of the kind which the acquisition would make available. *M. & M. Transportation Co.* v. *United States,* 128 F. Supp. 296 (D. Mass.), affirmed, 350 U. S. 857; *Anderson Motor Service* v. *United States,* 151 F. Supp. 577 (E. D. Mo.). In each of these cases, the Commission found that the proposed operations would provide better service for the public,[2] and it also found that the acquisition would have no appreciable adverse effect on competitors (128 F. Supp. at 300; 151 F. Supp. at 581). We submit that plainly there is no conflict between these decisions and the decision below. In the first place, proof that grant of an application will make available additional or better service for which there is public demand may be essential to a determination that the grant will be "consistent with the public interest" if the proposed service constitutes a serious threat to competitors, but not essential if there is no such threat. In the second place, in the cited cases the Commission in effect

[2] In *M. & M.* the Commission found that the applicant proposed to provide "a unified service, operating more efficiently", and an overnight through service between certain points "in response to the requests of shippers". 128 F. Supp. at 300. In *Anderson* the Commission found that "an improved and more efficient service to the public would result from the proposed transaction". 151 F. Supp. at 581.

found that the applicant had shown that there existed a public need for the service proposed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

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